

Arbitration Law Review

Volume 4 *Yearbook on Arbitration and Mediation*

Article 21

7-1-2012

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Recommended Citation

Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 212 (2012).

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THE UNIFORM COLLABORATIVE LAW ACT: STATUTORY FRAMEWORK AND THE STRUGGLE FOR APPROVAL BY THE AMERICAN BAR ASSOCIATION

Andrew J. Meyer*

I. INTRODUCTION

Modern divorce, alimony, marital property, child custody, and support laws were created by legislators and focus on the rights and responsibilities of parties.¹ The authority to break marital bonds is vested solely with the courts through an adversarial process that “most experts believe is ill-equipped to resolve the inter-disciplinary issues presented in a divorce case.”² The universal acceptance of no-fault divorce by the states has limited the adversarial nature of divorces, but financial awards of alimony, marital property, and child custody are often determined using a “fault-coupled-with-rights” approach.³ The results of divorce and other family law matters handled through the traditional litigation are rarely tailored to the unique problems of each case.⁴

Alternative Dispute Resolution (ADR) has played an important role in resolving family law cases for several decades and has been touted by experts as “limiting the negative impact that the animosity of litigation has on children and parents.”⁵ The most popular form of ADR for family law cases is mediation.⁶ In general, mediation is a non-adversarial, confidential resolution process facilitated by a neutral third party.⁷ Family law mediators “assist communication, encourage understanding, and focus participants on their individual and common interests.”⁸ Confidentiality is a key feature of mediation, because it enables parties to freely discuss alternatives without fear of information later being used in litigation.⁹ In divorce and other family law cases, mediation shifts the focus from rights to the interests of the parties, increasing the likelihood of a “win-win” outcome.¹⁰ Additionally, mediation gives parties more control over the outcome and reduces both monetary and emotional costs.¹¹ The success of

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¹ Elena B. Langan, “We Can Work It Out” Using Cooperative Mediation – A Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes, 30 REV. LITIG. 245, 246 (2011) (stating that the assignment of rights and responsibilities through divorce is a vestige from when marriage was commonly seen as a property transaction).

² *Id.* at 246–47.

³ *Id.* at 251. The approach taken by each individual state varies based on their divorce statutes.

⁴ *See id.* at 247.

⁵ *Id.* at 255 (noting that although ADR does not necessarily give the parties the same feelings of voice, procedural justice, vindication, validation, impact, and safety they would receive through traditional litigation).

⁶ *See id.* at 258 (stating that mediation was initially used exclusively for family law cases).

⁷ *Id.* at 259.

⁸ *Id.* at 260.

⁹ *Id.* at 262.

¹⁰ *See id.* at 260.

¹¹ *See id.* at 262–63.

mediation in family law cases has led many courts to order a mediation before a divorce case goes to trial.¹²

Like any system of dispute resolution, mediation is not perfect, and there are several drawbacks to using it to resolve family law issues. Participants in mediation are generally not allowed to have counsel present, and mediators are usually prohibited from explaining or giving their opinion on the law.¹³ This can leave parties ill-informed about their legal rights and obligations and may be particularly unfair if the parties are unequal in bargaining power.¹⁴

In 1990, Stuart Webb, a Minnesota family lawyer, created the collaborative law process as an alternative to both litigation and mediation.¹⁵ Like mediation, collaborative law is an out of court, non-adversarial process that helps parties achieve settlement in significantly less time and at a much lower cost than litigation.¹⁶ In collaborative law, each party is represented by counsel, negotiations are based on the parties' interests, there is no neutral third party facilitator, and the process is fully voluntary.¹⁷ The key feature of collaborative law is that each party and their attorney are required to enter into a "four-way" agreement which requires both attorneys to disqualify themselves if a settlement cannot be reached.¹⁸ This agreement prevents either party from threatening to go to litigation and increases the likelihood of a fair settlement.¹⁹ Collaborative lawyers might become aware of confidential information from the opposing party during the process. Allowing the attorneys to continue to represent their client in litigation could create an unfair advantage for a party.²⁰ The collaborative law process encourages cooperation and removes any economic incentive for attorneys to litigate a matter. Currently, there are approximately 22,000 attorneys trained in collaborative law techniques.²¹

The collaborative law process is guided by the following principles:

- 1) Define the interests, concerns, and goals of each party
- 2) Gather information necessary to allow the parties to make an informed decision
- 3) Develop options for resolution
- 4) Eliminate options that are unrealistic or detrimental
- 5) Negotiate a resolution on the basis that it is mutually beneficial to both parties²²

¹² See *id.* at 258.

¹³ See *id.* at 266-72.

¹⁴ See *id.* at 258, 272 (stating that without adequate information, resolving a matter through mediation may be seen as a denial of procedural justice).

¹⁵ Norman Solovay & Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, N.Y. DISP. RESOL. LAW., Spring 2009, at 36, 36 (initially collaborative law was only used for family law dispute, but has since expanded to other civil matters, including trusts and estates, intellectual property, employment, personal injury, and real estate).

¹⁶ See Langan, *supra* note 1, at 277 (in family law, collaborative law also helps protect the interest of non-client children).

¹⁷ See Solovay, *supra* note 15, at 36 (courts cannot order parties to settle a matter through collaborative law).

¹⁸ See Solovay, *supra* note 15, at 36 (in the agreement parties must also state their intention to resolve the matter without the intervention of an adjudicatory body, define the nature and the scope of the collaborative process, and identify each party's collaborative lawyer).

¹⁹ See Langan, *supra* note 1, at 277 (both parties attorneys are disqualified if a settlement is not reached).

²⁰ Solovay, *supra* note 15, at 37 (disqualification also gives the parties an incentive to reach a settlement to avoid the increased time and expenses required to hire a new counsel).

²¹ N.Y. STATE BAR ASS'N: DISPUTE RESOLUTION SECTION., REPORT ON THE UNIFORM COLLABORATIVE LAW ACT, 2, (2011), available at http://www.nysba.org/AM/Template.cfm?Section=Section_Reports_and_White_Papers&ContentID=52540&template=/CM/ContentDisplay.cfm [hereinafter *NYSBA Report*].

²² *NYSBA Report*, *supra* note 21, at 2.

Collaborative law is designed to encourage parties to engage in problem solving, rather than positional negotiations, and find creative solutions that maximize benefits to all sides.²³

II. THE UNIFORM COLLABORATIVE LAW ACT (UCLA)

Most collaborative law processes begin with parties entering into a collaborative law participation agreement.²⁴ In general, a collaborative law participation agreement states the parties' intention to resolve the matter without an adjudicatory body, defines the nature and scope of the collaborative law process, and identifies each party's collaborative lawyers.²⁵ Lawyers must fully inform their clients about the potential advantages and disadvantages of collaborative law before obtaining their consent.²⁶ There are currently no widely accepted standards for collaborative law, and participation agreements may vary greatly in their depth and detail.²⁷ Currently, only five states have adopted statutes or court rules setting minimum standards for collaborative law practice.²⁸

In light of the expanding use of collaborative law, in February 2007 the Uniform Law Commission (ULC) began drafting a model law to regulate collaborative law practice and establish minimum standards.²⁹ The ULC designed the Uniform Collaborative Law Act (UCLA) to establish expectations for both attorneys and clients about the collaborative process, give clear definitions, and reduce the costs of interstate disputes.³⁰ In July 2009, the ULC approved a draft of the UCLA, which was later revised, amended, and approved in October 2010.³¹ The UCLA is largely procedural in scope; it sets guidelines for the contents of collaborative law participation agreements and minimum standards of attorney conduct during the collaborative process.

The preface to the UCLA makes it clear that collaborative law must be voluntary, parties must agree to disclose all relevant information, and the standards of professional responsibility

²³ Andrew Shepard & David Hoffman, *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, DISP. RESOL. MAG., Fall 2010, at 26 (a respectful dialogue throughout negotiations is necessary to ensure win-win outcomes).

²⁴ *Id.* at 27 (the collaborative law participation agreement serves as an enforcement mechanism to ensure both lawyers will withdraw if the matter does not settle, both parties and their attorneys must sign the agreement).

²⁵ Solovay, *supra* note 15, at 36.

²⁶ Solvov, *supra* note 15, at 36.

²⁷ *NYSB Report*, *supra* note 21, at 5.

²⁸ See UNIF. LAW COMM'N, COLLABORATIVE LAW ACT SUMMARY (2010), available at <http://www.nccusl.org/ActSummary.aspx?title=Collaborative%20Law%20Act> (Texas, Utah and Nevada have adopted the UCLA, Alabama, the District of Columbia, Hawaii, and Massachusetts are considering adopting the UCLA, California and North Carolina have their own collaborative law statutes); see 2011 Tex. Sess. Law Serv. Ch. 1048 (West) (Texas recently enacted the UCLA which became effective on September 1, 2011); see UTAH CODE ANN. §§ 78B-19-101-116 (West 2010) (Utah adopted the UCLA in May 2010); see 2011 Nev. Legis. Serv. Ch. 43 (West) (Nevada adopted the UCLA in May 2011, it will go into effect on January 1, 2013); see N.C. GEN. STAT. ANN. §§ 50-70-79 (West 2003) (North Carolina adopted its own collaborative law act which applies only to divorce and separations proceedings); see CAL. FAM. CODE §§ 2010-2013 (West 2011) (California adopted its own collaborative law statute in January 2011, it applies only to family law disputes).

²⁹ Lawrence Maxwell, *An Update Uniform Collaborative Law Act Uniform Collaborative Law Rules Texas Uniform Collaborative Law Act*, ALTERNATIVE RESOL., Winter 2011, at 3, 4. (the Uniform Law Commission was formerly known as The National Conference of Commissioners on Uniform State Laws).

³⁰ See UNIF. LAW COMM'N., COLLABORATIVE LAW ACT SUMMARY (2010), available at <http://www.nccusl.org/ActSummary.aspx?title=Collaborative%20Law%20Act>.

³¹ Maxwell, *supra* note 29, at 4-5.

still apply to attorneys involved.³² Section 2 of the UCLA gives definitions for important collaborative law terms. A “collaborative matter” is defined as any dispute, transaction, claim, problem, or issue for resolution.³³ However, the ULC introduced an alternative definition for states that want to limit the scope of collaborative law to family law matters.³⁴

A collaborative law agreement must be in writing, signed by both parties, state the scope and nature of the dispute, name both parties’ collaborative lawyers, and state their intention to resolve the matter through collaborative law.³⁵ The collaborative law process begins when the parties sign the collaborative law participation agreement.³⁶ The collaborative law process may conclude when one party voluntarily decides to terminate the process with or without cause or when a party initiates litigation.³⁷ In general, parties must notify a tribunal before entering into a collaborative law agreement, and the tribunal can issue a stay on any pending proceedings until the collaborative law process has concluded.³⁸

During the collaborative law process, both parties must make timely, full, candid, and informal disclosures of all information relevant to the dispute and regularly update any information that has materially changed.³⁹ In general, communications made are confidential and privileged to facilitate open discussion between the parties.⁴⁰ However, a collaborative lawyer is required to screen clients to determine if there has been any violent or coercive behavior.⁴¹ If the attorneys discover that a violent or coercive relationship exists, they must still follow the rules of professional conduct and report the matter to the appropriate authorities.⁴²

The UCLA codifies a key provision of collaborative law practice: collaborative attorneys and the law firms they work for must disqualify themselves from representing their clients if a settlement is not reached.⁴³ This ensures that attorneys have no incentive to litigate and have a strong inclination to reach a fair settlement. The disqualification provision does not apply to low income parties who receive representation in the collaborative process through a legal services office or a government agency, since they may not be able to afford a second attorney if the matter goes to litigation.⁴⁴ There is always a risk that a settlement will not be reached through

³² UNIF. COLLABORATIVE LAW ACT Refs & Annos, U.L.A. (2010).

³³ UNIF. COLLABORATIVE LAW ACT §2.

³⁴ UNIF. COLLABORATIVE LAW ACT §2 (the family law matters include marriage, divorce, dissolution, annulment, property distribution, child custody, visitation, parenting time, alimony, maintenance, child support, adoption, parentage, premarital, marital, and post-marital agreements).

³⁵ UNIF. COLLABORATIVE LAW ACT §4 (these are the minimum conditions to enter into a collaborative law participation agreement, parties may supplement these requirements as they see fit this is to ensure that parties “opt-in” to collaborative law, rather than participate in it inadvertently).

³⁶ UNIF. COLLABORATIVE LAW ACT §5.

³⁷ UNIF. COLLABORATIVE LAW ACT §5 (the process can also be terminated if a party’s attorney withdraws, but it can be re-initiated if a new attorney is appointed, in general the collaborative process can be terminated at any time by either party).

³⁸ UNIF. COLLABORATIVE LAW ACT §6.

³⁹ UNIF. COLLABORATIVE LAW ACT §12.

⁴⁰ UNIF. COLLABORATIVE LAW ACT §§ 16, 17 (communications made during the collaborative process are not discoverable during litigation).

⁴¹ UNIF. COLLABORATIVE LAW ACT §15 (collaborative law will not work for parties that have a violent or coercive relationship, because they will not be able to effectively reach a mutual settlement).

⁴² UNIF. COLLABORATIVE LAW ACT §13.

⁴³ UNIF. COLLABORATIVE LAW ACT §9 (the law firm that the collaborative lawyer is associated with is also disqualified from representing the client in litigation).

⁴⁴ UNIF. COLLABORATIVE LAW ACT §§ 10, 11 (the lawyer that represents the client is still disqualified from representing the client, but another attorney from the legal services office or government agency can represent the client in litigation).

collaborative law and the client will have to hire a new attorney for litigation. Therefore, an attorney must obtain the client's informed consent before choosing collaborative law. Section 14 of the UCLA requires that the attorney discuss the advantages and disadvantages of the collaborative process and alternatives available with clients before signing a collaborative law participation agreement.⁴⁵

The UCLA provides a general framework for the procedural practice of collaborative law that can be adopted by states as either statutes or court rules. As collaborative law becomes more common it is likely that a greater number of states will adopt the UCLA.

III. ARGUMENTS FOR AND AGAINST THE UCLA

The ULC traditionally submits their uniform acts to the American Bar Association (ABA) for approval. This approval is not required, but uniform acts are not widely adopted by states until the ABA has given its official endorsement. The ULC approved the UCLA in July 2009, and it was later submitted to the ABA House of Delegates in February 2010.⁴⁶ The UCLA was later withdrawn after objections were raised by several ABA committees.⁴⁷ The UCLA was amended and reapproved by the ULC in October 2010. The revised UCLA was submitted to the ABA House of Delegates in August 2011. Similar objections were raised and the UCLA was not approved by the ABA by a vote of 298 to 154.⁴⁸

There are several reasons why the ABA claims that the UCLA is an inappropriate law. Opponents argue that the disqualification provision allows one side to “fire” an opposing party's attorney at a critical point in negotiations.⁴⁹ A party can disqualify the other side's attorney simply by terminating the collaborative process or initiating litigation. This can be particularly burdensome for a party that is unable to afford the time and cost of hiring a new attorney for litigation. There is also a potential ethical issue, because an attorney's continued representation is reliant upon the actions of a third party.⁵⁰ The disqualification provision may violate an attorney's ethical obligation to represent a client throughout a dispute.⁵¹ Collaborative law may also coerce attorneys to continue the process, even if negotiations have stalled, making clients feel as if they have lost control over the dispute.⁵² Collaborative law may not be appropriate for parties that wish to maintain privileged communications with their attorneys.⁵³ Finally, opponents of the UCLA argue that it is inappropriate for state legislatures to enact laws which

⁴⁵ UNIF. COLLABORATIVE LAW ACT §14 (the lawyer must inform the client that collaborative law is fully voluntary, if litigation is initiated the collaborative law process terminates, and the lawyer cannot represent the client in subsequent litigation).

⁴⁶ Maxwell, *supra* note 29, at 4.

⁴⁷ Shepard, *supra* note 23, at 27 (the litigation section, judicial division, and young lawyers section of the ABA opposed the UCLA as it was written).

⁴⁸ Rachel M. Zahorsky, *ABA Rejects Proposed Measure for Collaborative Law Guidelines*, ABA JOURNAL, Aug. 9, 2011, http://www.abajournal.com/news/article/the_aba_house_of_delegates_rejected_resolution_110b/.

⁴⁹ Langan, *supra* note 1, at 282 (parties are required to negotiate in good faith, but either party can terminate the collaborative process at any time with or without cause).

⁵⁰ Langan, *supra* note 1, at 283 (the disqualification provision potentially violates Model Rule 1.7(a)(2) which states that there is a conflict of interest if there is a significant risk that representation will be limited by a lawyer's responsibility to a third party).

⁵¹ Langan, *supra* note 1, at 281-82.

⁵² Langan, *supra* note 1, at 285.

⁵³ Langan, *supra* note 1, at 288 (collaborative law requires full and voluntary disclosure by both parties).

regulate the practice of law.⁵⁴ Parties could enter into their own collaborative law agreements without any assistance by state laws or court rules.

The ULC made several amendments to the UCLA to address the concerns initially raised by the ABA. The revised version of the UCLA can be adopted as a statute or as court rules, which addresses the concern about legislatures regulating the practice of law.⁵⁵ States can also choose to limit the applicability of the UCLA to family law or allow it to apply to all civil disputes.⁵⁶

The ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating that the UCLA does not violate any of the ethics provisions of the Model Rules on Professional Responsibility.⁵⁷ Rule 1.2(c) allows attorneys to limit the scope of their representation, so long as it is reasonable under the circumstance and the client's informed consent is obtained.⁵⁸ The UCLA requires attorneys to fully inform their clients about the advantages and disadvantages of collaborative law, discuss available alternatives, and inform clients that if a settlement is not reached the attorney must withdraw. The Committee determined that the UCLA is sufficiently in compliance with Rule 1.2(c).⁵⁹ The Committee also determined that there is no issue under Rule 1.7(a)(2) regarding a collaborative attorneys only offering limited representation.⁶⁰ Rule 1.7(a)(2) states that an attorney's loyalty and independent judgment are essential to their relation with a client.⁶¹ A potential conflict cannot limit an attorney's responsibility or interest and foreclose alternatives for clients.⁶² The disqualification provision in a collaborative law participation agreement does not materially limit a lawyer's ability to represent a client, nor does it foreclose all alternatives available to client. Going forward as collaborative law practice becomes more common, an increasing number of states may find it necessary to adopt the UCLA scheme to set minimum standards in order to protect clients' interests.

IV. CONCLUSION

The UCLA provides workable minimum standards for the practice of collaborative law. The Act ensures that clients receive fair representation and that parties will work together to reach creative settlements for their disputes. The UCLA also gives participants in collaborative law incentive to avoid costly adversarial litigation. Despite the ABA rejecting the current version of the UCLA, more states will likely adopt the model act as collaborative law becomes an increasingly common form of ADR.

⁵⁴ Langan, *supra* note 1, at 282 (noting how most states consider the regulation of the practice of law the exclusive jurisdiction of the courts).

⁵⁵ Maxwell, *supra* note 29, at 5 (the ULC recommends that several provisions of the UCLA are adopted as court rules).

⁵⁶ Maxwell, *supra* note 29, at 5 (this relates to the definition of "collaborative matter" in section 2 of the UCLA).

⁵⁷ ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 07-447 (2007).

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 4.

⁶² *Id.* at 4.